REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1905 OF 2009

SAMSUL HAQUE ….Appellant

VERSUS

THE STATE OF ASSAM ….Respondent

WITH

CRIMINAL APPEAL NO. 246 OF 2011

J U D G M E N T

SANJAY KISHAN KAUL, J.

1. The incident is of 17.3.1997 at 7:00 a.m. in the morning. Keramat Ali Maral (the deceased) was having tea at the tea stall known as Kalia Hotel. It is alleged that Abdul Hai, Abdul Rashid, Imdadul Islam, Rahul Amin, Mofizuddin Islam and Abdul Rahim Faruki, being the first six accused entered the stall and all of a sudden accused Nos.2 & 3 fired at

Keramat Ali with a pistol, while the other accused injured him by stabbing and hacking with daggers, swords, etc. Keramat Ali is stated to have died on the spot. The son of Keramat Ali, Nazrul Islam (PW-3) lodged the FIR, stating that he was present at the site along with other witnesses, but when they offered resistance, they were threatened with pistols. To save their life, they ran away from the site. Insofar as accused Nos.7, 8 & 9 are concerned, it is stated that "further it may be mentioned that the incident took place at the instance and instigation of accused Nos.7, 8 and 9."

2. On the investigation being completed, a charge-sheet was filed and charges were framed by the Sessions Judge under Sections 147, 148, 302/149 and 302 of the IPC against all. Accused Nos.7 to 9 faced charges under Sections 302/109 of the IPC. In the course of trial, accused No.4, Rahul Amin, absconded. Accused No.1, Abdul Hai, died/ was allegedly murdered during the course of trial. On completion of trial the Sessions Judge, Morigaon found that accused No.1 was the main culprit who had killed the deceased, Keramat Ali. The trial court also found that the guilt of accused Nos.5 & 6 was also established beyond reasonable doubt.

3. The convicted accused filed an appeal before the Gauhati High Court and so did the State of Assam *qua* the accused who had been acquitted. The appeal of the convicted accused was dismissed by the High Court and the Special Leave Petition ('SLP') filed against the same was also dismissed and, thus, that matter attained finality.

4. The impugned judgment dated 12.2.2009 deals with the appeal of the State and has reversed the judgment of the trial court convicting the five accused.

5. Accused No.9, Samsul Haque has filed Crl. Appeal No.1905/2009, while Abdul Rashid (accused No.2) and Imdadul Islam (accused No.3) filed Crl. Appeal No.246/2011. It is these three accused who are before us.

6. We have heard Mr. R.K. Dash, learned Senior Counsel for accused No.9, Mr. Bijan Ghosh, learned counsel for accused Nos.2 & 3 and learned counsel for the State, Mr. Debojit Borkakati who took us through the record before us. We have also perused the trial court record.

7. We would first deal with the witnesses produced by the prosecution to prove their case. Four witnesses were projected as eye-witnesses to the occurrence, viz., Taher Ali (PW-1); Nazrul Islam (PW-3), who is the son of the deceased and the informant; Sorhab Ali (PW-4), brother of the deceased; Mozammil Hussain (PW-6), son of the elder brother of the deceased. While three of the witnesses are relatives, PW-1 is an independent witness. It may be noted that Mr. Dilip Modak, owner of the hotel, or any other independent witness present at the place of occurrence was not examined. Mr. Somnath Bora, the IO was produced as PW-7. It may also be noted that the defence examined only one witness, i.e. Siraj Ali (DW-1), who was at the place of the occurrence as recognised by the prosecution.

8. Learned Senior Counsel for accused No.9 contended that the complainant in the complaint itself made a very vague statement that “the incident took place at the instance and instigation of” the said accused and two others. Nothing more was said as to how it was at the instance and instigation of these three accused.

9. The second limb of his submission was that three of the witnesses, PW-3, PW-4 and PW-6 were interested and inimical witnesses inasmuch as PW-3, the son of PW-4 and PW-6 were accused in the murder case of the main accused, accused No.1, Abdul Hai. The testimony of these three witnesses was stated to be full of exaggerations, embellishments and inconsistencies. An important aspect emphasised in this behalf is that the version given by PW-3 in the complaint, as recorded in the FIR, is at variance with the narration of the incident when the said witness entered the witness box. Thus, while on the one hand in the complaint it was alleged that the incident happened at the instance and instigation of the appellant and two other accused, in the testimony before the court it has been stated that these three persons ordered the other accused to catch hold of his father, the deceased, whereafter accused Abdul Rashid, who is accused No.2 shot at the deceased with a pistol while accused No.1 hit him in the chest, hands and legs with a sword. The testimony of PW-4 and PW-6 states that accused No.9 and two others asked other accomplices to hit and kill the deceased.

10. The aforesaid testimony, it was submitted before us, has to be read in the context of the testimony of the only independent witness, i.e., PW-1, who did not implicate the appellant in the crime. In fact, in his testimony he has specifically stated that he did not see accused No.8 and accused No.9 either inside or outside the hotel. Learned Senior Counsel also submitted that a reading of the complaint, resulting in the FIR would show that the appellant had not come to the place of occurrence along with the others. DW-1, who was present at the place of occurrence, according to the prosecution, stated that accused No.1 and two others committed the crime, but he had not seen any one of the family members of the deceased at the place of the occurrence. In fact, the suggestion in the cross-examination of the said witness by the prosecution was that accused No.7 had given orders to assault the deceased, but that suggestion had been denied by the witness.

11. The third limb of the submission of the learned Senior Counsel is based on the statement of accused No.9, recorded under Section 313 of the Cr.P.C. It was argued that the questions asked did not really put the case of the prosecution to the accused as was mandatory. Only two

questions were put in the said statement, which are as under:

> "Question: PW4 Sohrab Ali has averred in evidence that at about 7 a.m. 17.3.97, you said, "Kill Keramat Ali." What is your reply?
>
> Ans: I was not there in the place of occurrence. My house is at a distance of 4 or 5 kilometers from there.
>
> Question: PW6 has stated that you asked the other accused to kill Keramat. What do you say?
>
> Ans: No I was not present at the place of occurrence. A civil suit is pending over the complainant's purchasing a plot of land. I was one witness to (the execution of) the sale deed. Out of that grudge they filed a false case against me."

12. The case of PW-3 was, thus, not even put to the accused.

13. In the aforesaid context learned Senior Counsel has referred to the judgment of this Court in ***Sharad Birdichand Sarda v. State of Maharashtra***[1] to contend that if the circumstances are not put to the accused in his statement under Section 313 of the Cr.P.C., they must be completely excluded from consideration because the accused did not have any chance to explain them. This is stated to be the consistent view of this Court starting from 1953 in the case of ***Hate Singh Bhagat Singh***

1 (1984) 4 SCC 116

v. State of Madhya Bharat[2]. Learned Senior Counsel also referred to the judgment in ***Sujit Biswas v. State of Assam***[3] for the proposition that the very purpose of examining the accused persons under Section 313 of the Cr.P.C. is to meet the requirement of the principles of natural justice, i.e., *audi alteram partem*. The accused, thus, must be given an opportunity to explain the incriminating material that has surfaced against him and the circumstances which are not put to the accused in his examination under Section 313 of the Cr.P.C. cannot be used against him and must be excluded from consideration.

14. The fourth limb of the submission of the learned Senior Counsel arose from the acquittal of accused No.9 by the trial court and the conviction on reversal of acquittal in appeal. Thus, the plea was that the principles of such reversal require that the view of the trial court should be respected unless and until the views are such as were perverse or otherwise unsustainable. Ordinarily, the judgment of acquittal, where two views are possible, should not be set aside even if the view formed

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2AIR 1953 SC 468
3 (2013) 12 SCC 406

by the appellate court may be a more probable one.[4]

15. The last submission of the learned Senior Counsel, possibly because it is the weakest one, was that the ingredients of common intention under Section 34 of the IPC and abetment under Section 107 of the IPC are distinct and separate. The principle of constructive liability, enunciated in Section 34 of the IPC does not create a substantive offence, unlike Section 107 of the IPC, which is an independent offence. It was, thus, submitted that a person charged with Section 109 of the IPC (the punishment provision for Section 107 of the IPC) cannot be convicted for the main offence under Section 34 of the IPC. To advance this plea, reliance was placed on ***Babu v. State of Tamil Nadu***[5]. However, in the factual matrix of that case the person was charged under Section 34 of the IPC and not under Section 109 of the IPC. The observations made in that judgment, thus, have to be read in that context since substantive offence as per Section 107 with punishment under Section 109 of the IPC was not an aspect which the accused was charged with. The factual matrix in the

4 ***Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra*** (2010) 13 SCC 657
5 (2013) 8 SCC 60

present case is the opposite where the plea is that there is no charge under Section 34 of the IPC but charge of abetment has been laid under Section 109.

16. The aforesaid last plea can be dealt with at this stage itself as the issue is no more *res integra* in view of the judgment of this Court in ***State of Orissa v. Arjun Das Agarwal & Anr.***[6] opining that the settled position of law is that Section 34 of the IPC does not create a distinct offence and it is with the participation of the accused that the intention of committing the crime is established when Section 34 of the IPC is attracted. To rope in a person with the aid of Section 34 of the IPC, the prosecution has to prove that the criminal act was done by the actual participation of more than one person and that act was done in furtherance of a common intention of all engaged in prior concert.

17. In view of the aforesaid, the last plea of the learned counsel is only stated to be rejected.

18. On examination of the earlier pleas advanced by learned Senior

6 AIR 1999 SC 3229

Counsel on behalf of accused No.9, we find merit in the same.

19. PW-3 in his complaint did state that the incident took place at the instance and instigation of accused No.9 along with accused Nos.7 & 8.

20. However, in his deposition it has been stated that these persons asked the other accused to catch hold of the deceased. This by itself, in our view, would not be fatal for the case of the prosecution. Similarly, there is some variation between what exactly these three persons stated, as available from the testimonies of even PW-4 and PW-6. However, the crucial aspect is that PW-1, the only independent witness, does not even implicate accused No.9, much less assign any role to him. He has stated that he had not even seen accused No.9, even though he was the person who was at the place of occurrence. DW-1, who was not produced as a witness by the prosecution, though was stated to be present at the place of occurrence, was examined by the defence and deposed against the main accused (accused No.1) and others, while not assigning even the factum of presence to accused No.9. Interestingly, even when the prosecution sought to cross-examine the said witness, the case of the prosecution was put as if only accused No.7 ordered the other accused persons to assault

the deceased. Had accused No.9 played a role, that would logically have been put to DW-1 by the prosecution.

21. The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to accused No.9, and the statement recorded under Section 313 of the Cr.P.C. To say the least it is perfunctory.

22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of *audi alteram partem*. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in ***Asraf Ali v. State of Assam***[7]. The relevant observations are in the following paragraphs:

> "21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom

7 (2008) 16 SCC 328

that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 SC 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

23. While making the aforesaid observations, this Court also referred to its earlier judgment of the three Judge Bench in ***Shivaji Sahabrao Bobade v. State of Maharashtra***[8], which considered the fall out of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement

8 (1973) 2 SCC 793

that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 of the Cr.P.C., the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed[9].

24. We are, however, not inclined to follow that course in the given circumstances of this case as the inconsistencies in the testimonies also create a doubt in the case of the prosecution *qua* any role of accused No.9. The aforesaid being the factual matrix, the appellate court could hardly have overturned the acquittal of the trial court into one of conviction. The trial court took note of the close relationship of PW-3, PW-4 & PW-6 to the deceased, as also the array of the accused and the murder of accused No.1, to come to the conclusion that the abetment of accused No.9, as alleged, had not been proved beyond reasonable doubt. In fact, it is opined that there is no evidence that the said accused was inside or outside Kalia Hotel at the time of the occurrence. Given the

9 ***Shivaji Sahabrao Bobade v. State of Maharashtra*** (supra)

circumstances, while not disagreeing with the legal proposition stated in the impugned judgment, that there is no law that the evidence of relatives cannot be acted upon, but, with extra care and caution, the presence of disinterested witnesses as PW-1 and DW-1 relate another story. The finding in the impugned order, that in the FIR filed by PW-3 as the complainant, on the very date of the occurrence, setting out the involvement of all the accused as clearly stated, again cannot be sustained for the reason of the improvements and embellishments between what was stated in the FIR and what came from the mouth of PW-3 as his testimony in the court.

25. We are, thus, of the view that the prosecution has not been able to establish a case against accused No.9, much less beyond reasonable doubt.

26. Now, turning to the case of accused Nos.2 & 3, who are still in custody, unlike accused No.9, who has since been enlarged on bail by this Court.

27. Learned counsel sought to adopt the arguments advanced on behalf

of accused No.9, but then the same would not be of much use as the case of accused No.9 is quite different from the case against accused Nos.2 & 3.

28. A perusal of the order of the trial court would show that what has weighed in acquitting these two accused was the fact that in the testimony of the Doctor (PW-5), who performed the *post-mortem* examination on the body of the deceased, a number of injuries were found, caused by sharp pointed objects. In the cross-examination PW-5 has specifically stated that none of the injuries is a gun-shot injury. Thus, the medical evidence suggests the use of daggers and a sword. The plea of the Public Prosecutor was that the gun used by these two accused (as according to the role assigned to them) may have been used only to scare away the persons. However, there has been no seizure of arms. Accused No.1, the main culprit, was subsequently murdered, and the related witnesses in the present case are the accused. PW-6 also did not see the firing of the gun, though he claims to have heard the gun-shots though PW-3 and PW-4 state that they saw the firing. The anomaly is that all the accused were standing together.

29. On a question put by the court, whether any bullets or bullet marks were found at the site, learned counsel for the State fairly stated in the negative.

30. The question, which, thus, arises is that whether, within the parameters required for reversal of an order of acquittal, the needful is met in the present case.

31. The impugned judgment is, once again, predicated on a reasoning placing reliance on the testimony of the related witnesses. The reason to treat the same with some caution has already been set out by us hereinbefore. The testimony of PW-6, that he saw the gun being fired, but could not make out whether a bullet hit the deceased or not has been taken into account, but, in the context of the overall testimony of the eye-witnesses, the story set forth by the prosecution and the witnesses was found to be believable by the High Court. However, this story does not deal with the aforesaid aspects noted by the trial court, i.e., no bullet injury, the weapon not being recovered, no bullets or bullet marks being found at the place of occurrence and the inconsistencies in the

testimonies of the witnesses. The trial court rightly observed that it was accused No.1 who was the main accused, who was subsequently murdered.

32. We may, however, note that insofar as the statement of accused No.2, under Section 313 of the Cr.P.C. is concerned, the testimonies of PW-3, PW-4 and PW-6 all have been put to him but the said accused claimed absence from the place of the occurrence. As far as accused No.3 is concerned, once again, the testimonies of all the three eye-witnesses have been put to him, but the role sought to be assigned to him is stated to be a hit with the dagger, and not the role of firing at the accused as set out in the FIR.

33. The subsequent testimonies, however, sought to assign a different role than the one assigned in the FIR, bringing about an inconsistency. The view taken by the trial court is, at least, a plausible view though that may not be the only plausible view or if one may say even the less probable one.

34. We are, thus, of the considered opinion that the prosecution has not been able to prove the case beyond reasonable doubt against these two accused, and they must get the benefit of doubt and consequently have to be acquitted.

35. The result of the aforesaid findings is that Samsul Haque, accused No.9 is entitled to a clean acquittal. He is already on bail and thus, the bail bonds stand discharged. Abdul Rashid & Imdadul Islam, accused Nos.2 & 3 respectively, are entitled to the benefit of doubt and are consequently acquitted. The said accused may be released forthwith.

36. The appeals are accordingly allowed, leaving the parties to bear their own costs.

....……J.
[Sanjay Kishan Kaul]

....……J.
[K.M. Joseph]

New Delhi.
August 26, 2019.